

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1999 SESSION

FILED

January 13, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellant,

VS.

OSCAR BERNAL,

Appellee.

NO. M1999-00079-CCA-R3-CD

DAVIDSON COUNTY

HON. WALTER C. KURTZ,
JUDGE

(Aggravated Rape, Aggravated
Sexual Battery, Rape, Attempted
Rape)

FOR THE APPELLANT:

PAUL G. SUMMERS
Attorney General and Reporter

KIM R. HELPER
Assistant Attorney General
Cordell Hull Building, 2nd Floor
425 Fifth Avenue North
Nashville, TN 37243-0493

VICTOR S. JOHNSON III
District Attorney General

JOHN C. ZIMMERMAN
Assistant District Attorney General
Washington Square, Suite 500
222 Second Ave. North
Nashville, TN 37201-1649

FOR THE APPELLEE:

JEFFREY A. DEVASHER
(On Appeal)
CLARK B. THORNTON
(On Appeal and At Hearing)
EMMA R. TENNENT
(At Hearing)
Assistant Public Defenders
1202 Stahlman Bldg.
Nashville, TN 37201-5066

OPINION FILED: _____

AFFIRMED

JOE G. RILEY, JUDGE

OPINION

Defendant filed a motion to dismiss ten counts of a fourteen-count sexual abuse indictment, asserting the statute of limitations had expired. The indictment alleged the statute of limitations was tolled by the defendant's acts of intimidation and concealment of his crimes. The trial court granted defendant's motion to dismiss. The State appeals as of right under Rule 3 of the Tennessee Rules of Appellate Procedure. Upon consideration of the issue presented for review, we **AFFIRM** the judgment of the trial court.

ALLEGATIONS IN THE INDICTMENT

Defendant was indicted on four counts of aggravated rape, two counts of aggravated sexual battery, seven counts of rape, and one count of attempted rape in connection with the alleged sexual abuse of his step-daughter. The alleged abuse ended in 1992 when the victim was fourteen years old but was not reported until February 17, 1997, when the victim was nineteen years old. The charging instrument was filed shortly thereafter.

Defendant sought dismissal of all counts of the indictment, except the aggravated rape counts, claiming the statute of limitations had expired. The motion was granted and the remaining four aggravated rape counts were set for trial.

APPELLATE PROCEDURE

The defendant argues that the state cannot appeal this issue as of right under Rule 3(c)(1) of the Tennessee Rules of Appellate Procedure. Defendant claims Rule 3(c)(1) only allows an appeal from a trial court order "the substantive effect of which results in dismissal of the indictment." Tenn. R. App. P. 3(c)(1). Defendant argues that only ten counts of the indictment were dismissed, not the entire indictment. Therefore, defendant claims a Rule 3 appeal is inappropriate.

For purposes of evaluating consistency of jury verdicts in a multi-count indictment, each count is considered a separate indictment. Wiggins v. State, 498 S.W.2d 92, 93-94 (Tenn. 1973). Thus, consistency of jury verdicts is unnecessary. *Id.* However, our Supreme Court has recently indicated that a Tenn. R. App. P. 9

or 10 interlocutory appeal by the state is appropriate when the trial court dismisses less than all counts in a multi-count indictment prior to trial. State v. Vickers, 970 S.W.2d 444, 448, n.4 (Tenn. 1998).

If a Rule 3 appeal is improper, we exercise our discretion and treat this as a Rule 10 appeal. The ruling of the trial court resulted in the state losing a right that could never be recaptured. State v. Willoughby, 594 S.W.2d 388, 392 (Tenn. 1980). Therefore, as our Supreme Court did in State v. Gallaher, 730 S.W.2d 622, 623 (Tenn. 1987), we can treat the state's Rule 3 appeal as a Rule 10 appeal. Regardless, we will consider the appeal on its merits.

STATUTE OF LIMITATIONS

The state concedes that the statute of limitations was exceeded,¹ but relies upon Tenn. Code Ann. § 40-2-103 which states that "no period during which a party charged conceals his criminal acts is included" in the running of the statute of limitations. We conclude the indictment does not allege sufficient tolling facts.

The indictment alleged over five pages of "tolling facts." These allegations described a period of physical and sexual abuse prior to the victim becoming fourteen years of age. There were also allegations of abuse by the defendant against the victim's siblings of which the victim was aware. The indictment alleged that the victim continued to be physically afraid of the defendant until the age of nineteen when charges were filed. Although the indictment alleged numerous intimidating acts by the victim's mother to prevent the victim's disclosure of defendant's acts, there were no allegations that the defendant himself threatened, coerced or intimidated the victim after the abuse ended when the victim was fourteen.

¹Prosecutions for certain offenses committed against a child "shall commence no later than the date the child obtains majority or within four years next after the commission of the offense, whichever occurs later." Tenn. Code Ann. § 40-2-101(d). The alleged abuse in this case ceased when the victim was fourteen and was not reported until she was nineteen. However, the offense of attempted rape is controlled by Tenn. Code Ann. § 40-2-101(b)(3) which establishes a four-year statute of limitations for a Class C felony without regard to the age of the victim. Attempted rape is not included in the offenses listed under Tenn. Code Ann. § 40-2-101(d).

“Tolling facts” must be pleaded in the indictment when the prosecution is commenced outside the limitations period. State v. White, 939 S.W.2d 113, 115 (Tenn. Crim. App. 1996); see *also* State v. Messamore, 937 S.W.2d 916, 918, n.2 (Tenn. 1996) (declining to overrule cases requiring that tolling facts be pleaded but reserving decision on this issue for a case in which it is “squarely presented”).

Parental control alone is insufficient to meet the concealment exception in Tenn. Code Ann. § 40-2-103. State v. Henry, 834 S.W.2d 273, 275-76 (Tenn. 1992). While Henry recognizes that “positive acts of intimidation” in connection with parental control can toll the statute, the instant indictment alleges no such acts by the defendant. *Id.* at 275, n.6. The acts of the victim’s mother cannot be attributed to the defendant.

In addition, “if the tolling is triggered by concealment, the statute would begin to run when the concealment ended.” State v. Davidson, 816 S.W.2d 316, 321 (Tenn. 1991). The abuse of the victim ended when the victim was fourteen. It is clear from the facts alleged in the indictment that any acts of intimidation perpetrated by the defendant against the victim ended with the abuse.

We must, therefore, conclude that the trial court properly dismissed the ten counts of the indictment. However, as to those counts of the indictment alleging rapes committed from 1990 through 1992, we make the following observations. Rape is a Class B felony. Tenn. Code Ann. § 39-13-503(b)(1991). The standard limitation for prosecution of a Class B felony is eight years. Tenn. Code Ann. § 40-2-101(b)(2)(1990). The prosecution of all alleged rapes committed from 1990 through 1992 was commenced within the eight years. Nevertheless, Tenn. Code Ann. § 40-2-101(d) (1990) expressly lists rape involving a child as an offense requiring prosecution within four years of commission or when the child reaches majority, whichever is later. Thus, in this case there is a shorter limitations period for the child victim than there would be for an adult victim. We sincerely doubt that the legislature intended such a result; however, we are bound by the unambiguous language of the statute. We note the legislature amended the statute in 1997 to remedy this disparity. See Tenn. Code Ann. § 40-2-101(f)(1997). The amendment expressly states that it only applies to offenses committed after July 1, 1997. *Id.*

CONCLUSION

We find the trial court properly granted defendant's motion to dismiss ten counts of the indictment and, therefore, **AFFIRM** the judgment below.

JOE G. RILEY, JUDGE

CONCUR:

JAMES CURWOOD WITT, JR., JUDGE

ALAN E. GLENN, JUDGE